ARAB MALAYSIAN CREDIT BERHAD

v.

PRINWELL (M) SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' SHAIK DAUD J.
[CIVIL SUIT NO: C4987-85]
7 JUNE 1993

PRACTICE & PROCEDURE: Application to set aside judgment in default - Judgment obtained pursuant to service of writ by substituted service - Application for substituted service not specifying method of substituted service - Non-compliance with O. 62 r. 5(2) and Form 136 Rules of the High Court 1980 - Whether judgment obtained irregular - Whether defendant entitled to have judgment set aside ex debitio justitiae.

The defendant appealed against the SAR's decision dismissing his application to have a judgment in default of appearance set aside. The defendant contended that the judgment obtained by the plaintiff against him was an irregular judgment as the plaintiff's application for substituted service of the writ did not comply with O. 62 r. 5(2) and Form 136 of the Rules of the High Court 1980 in that the method of the substituted service was not specified therein.

Held:

[1] Where proceedings are taken in the absence of one party it is most important that there should be strict compliance with the rules. In an application for substituted service it was necessary to mention the mode of such service and failure to do so would render the default judgment obtained pursuant thereto irregular.

[2] No mention was made in the affidavit in support of the application for substituted service of the mode of the proposed substituted service and hence the SAR ought not to have ordered substituted service. The default judgment obtained against the defendant was irregular and the defendant was entitled to have it set aside *ex debitio justitiae.*

[Appeal allowed with costs. Default judgment set aside].

Cases referred to:

Deverall v. Grant Advertising [1955] Ch. III ***(refd)***
P.T. Pelajaran Nasional Indonesia v. Joo Seng & Co. Ltd. [1958] 24 MLJ 113 ***(foll)***
Hampa-Adams v. Hall [1911] 2 KB 942 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 62 r. 5(2), Form 136

Other sources referred to:

Mallal's Supreme Court Practice, 2nd Edn., p. 851, para 62/5/2

For the plaintiff - P Pereira; M/s. Skrine & Company
For the defendant - R Rajes; M/s. Paul Chong & Kraal

JUDGMENT

Shaik Daud J:

This is an appeal by the 9th. defendant against the learned Senior Assistant Registrar's decision dismissing his application by summons in chambers to have a judgment in default of appearance set aside.

It is the contention of the appellant that the default judgment obtained by the plaintiff against him is an irregular judgment and as such ought to be set aside *ex debitio justitiae.* The appellant contends that the plaintiffs application for substituted service did not comply with O. 62 r. 5(2) and Form 136 of the Rules of the High Court 1980 as the method of the substituted service was not specified therein.

Order 62 r. 5(2) of the Rules of the High Court states:

> (2) an application for an order for substituted service must be made by summons supported by an affidavit in Form 136 stating the facts on which the application is founded.

At the bottom of Form 136 there appear a note as follows:

> Note - The affidavit should also specify the method of substituted service asked for, and state that if such service is ordered it will probably be effectual in bringing the writ (or as may be) to the knowledge of the defendant. If the defendant is evading service the affidavit should be state.

In the affidavit in support of the application for substituted service no mention is made of the mode of the substituted service. To my mind the reason for this requirement is quite clear, it is so that the proposed substituted service will probably come to the knowledge of the defendant. It is my view that if the affidavit spells out a method of substituted service

which in the mind of the Registrar would not probably come to the knowledge of the defendant the Registrar would in most probability refuse to order substituted service. Thus the mode of the substituted service becomes an important factor in the approval of a substituted service application.

The learned author of **Mallal's Supreme Court Practice** 2nd Edn. at paragraphs 62/5/2 on page 851 quotes Roner LJ in *Deverall v. Grant Advertising* [1955] Ch. III;

> The intention which underlines all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings.

So even when an order for substituted service has been made the judgment can be set aside when it is disclosed that the defendant is not aware of the proceedings and was not avoiding service. Therefore in the application for substituted service it becomes all important to mention the mode of such service, and failure to do so, in my mind, would render the default judgment obtained as being irregular. Where proceedings are taken in the absence of one party it is most important that there should be strict compliance with the rules. (See *P.T. Pelajaran Nasional Indonesia v. Joo Seang & Co. Ltd.* [1958] 24 MLJ 113 following the decision in *Hampa-Adams v. Hall* [1911] 2 KB 942.

From my perusal of the affidavit in support of the application for substituted service I must agree with the submission of learned Counsel for appellant that no mention is made of the mode of the proposed substituted service and hence the learned Senior Assistant Registrar ought not to have ordered substituted service. I therefore find that the default judgment obtained against the appellant to be an irregular judgment and consequently the appellant is entitled to have it set aside *ex debitio justitiae*. In view of this finding I feel there is no need for me to go into the merits and the appeal by the 9th. defendant is hereby allowed with costs, and the default judgment is set aside.

CHIN HWA ENGINEERING DEVELOPMENT CO.

v.

THE STATE GOVERNMENT OF SARAWAK

HIGH COURT, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J.
[ORIGINATING SUMMONS NO. KG. 269 OF 1992 (II)]
28 JUNE 1993

ARBITRATION: Dispute referred to arbitration - Arbitrator making award in favour of plaintiff - Defendant not taking any steps to set aside award or to have award declared as not binding for want of jurisdiction - Section 24(2) Arbitration Act 1952 - Order 69 Rules of the High Court 1980 - Application for leave to enforce award of arbitrator - Whether award final and binding - Whether invalidity of award could be raised in present application - Whether defendant precluded from raising the issue of validity of the award.

The plaintiff applied, pursuant to the provisions of s. 27 of the Arbitration Act 1952 (the Act), for an order that the plaintiff may have leave to enforce the award of the arbitrator, which arose out of the dispute referred to the arbitrator by the plaintiff and defendant pursuant to the terms of the contract between the plaintiff and the defendant, in the same manner as a judgment or order to the same effect.

The defendant did not take any steps to have the award set aside or to have it declared as not binding on the defendant for want of jurisdiction pursuant to O. 69 of the Rules of the High Court 1980 (RHC 1980). The defendant in opposing the plaintiff's application contended that inspite of the fact that no steps were taken to set aside the award they were not precluded from raising the issue in the present application.

Held:

[1] Once an award has been made and the time limit for challenging it has expired, the award becomes irrevocably final and binding and it can therefore be entered as a judgment and enforced accordingly.

[2] To allow the defendant to raise the question of jurisdiction of the arbitrator in the present application would be to fly in the face of the